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—IN THE—

Supreme Court of the United States

ON WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

THE GERMAN SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL, AND ERNEST B. TULL,
Defendants in Error.

No. 404
October Term,
1902.

Brief of Ernest B. Tull, a Minor, on Motion to Dismiss or Affirm.

WM. M. MURRAY,
Guardian *ad litem* for Ernest B. Tull,
a minor, *in propria persona.*

FREDERICK W. DEWART, Of Counsel.
Spokane, Wash.

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Motion to Dismiss or Affirm.

Comes now Ernest B. Tull, defendant in error, by his guardian *ad litem*, William M. Murray, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because no Federal question was set up or claimed in this cause before the Supreme Court of the State of Washington, and also because the decision of the Supreme

Court of the State of Washington was based upon a ground which did not involve a Federal question, and which was broad enough to support the judgment.

And the said defendant in error, also moves the Court to affirm the said judgment or decree from which said writ of error purports to have been taken, because although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, is frivolous, and does not need further argument.

WILLIAM M. MURRAY,
Guardian *ad litem* of Ernest B. Tull, a minor,
in propria persona.

Statement of Facts.

The facts in the case, in so far as it is necessary for them to be considered on this motion, are as follows:

In 1888, Mrs. Lucy A. Tull died in the city of Spokane, leaving surviving her, her husband, F. M. Tull, and three minor children, Dora May Tull (later Dora May Dormitzer, now Dora May Seeley), aged ten, William L. Tull, aged fourteen, and Ernest B. Tull, aged five. She and her husband owned the real estate described in the pleadings, consisting of about half of a block of ground near the business center of Spokane. The parties understood the property to be community property and treated it as such, in which case one-half of the property, under the laws of the State of Washington,

descended to the three children above named, and the other half belonged to the father, F. M. Tull.

In order to complete the improvements which were being made on this property at the time of her death, it was necessary to make a loan with the property as security, and F. M. Tull applied to the German Savings & Loan Society, the plaintiff in error (hereinafter designated as the Society), for the loan, but the Society refused to take a mortgage from the children or from anyone acting for them. But the attorney for Mr. Tull and the attorney for the Society arranged a plan which was then carried out, as follows:

Probate proceedings were conducted in which F. M. Tull's brother was named as guardian for the children, and filed his bond with F. M. Tull and one other as security. The children's interest in the property was sold under order of the Court and bid in by F. M. Tull, who paid for it with his note to the children's guardian, secured by a second mortgage on the property purchased. The Society was given the first mortgage on the property by F. M. Tull for its loan. The sale to F. M. Tull was reported to the Probate Court as a cash transaction and was confirmed. Later the loans from the Society being increased and new mortgages being given to it, the guardian released the mortgage given by F. M. Tull and marked it on the records as paid and satisfied, although in the entire proceeding not one cent of money had been handled by him.

The interest was paid on the loan for a while, but later F. M. Tull became in default for both principal and interest

on the loan to the Society and in 1896 the Society foreclosed its mortgage by proceedings in the United States Circuit Court and bought in the property at the sale for the amount of the judgment.

In 1897 this suit was begun in the Superior Court of Spokane County, Washington, by the two children, who were now of age, making their infant brother a party defendant, against the Society, setting up the probate and other proceedings, and asking to have the whole declared void and their one-half interest in the property returned to them.

Among the defenses set up by the Society was that in 1886 F. M. Tull had obtained in the State of Kansas a divorce from Lucy A. Tull on the ground of adultery, and that under the laws of the State of Kansas, all the property thereby became his separate property. That about three months later F. M. Tull and Lucy A. Tull remarried in the State of Washington, but the property which he had at the time of his remarriage did not become the community property of himself and wife; that therefore the probate proceedings were useless and unnecessary, as the entire interest in the property was in F. M. Tull before and after the death of his wife.

The plaintiffs and the infant defendant, by his guardian *ad litem*, thereupon claimed that the decree of divorce rendered by the Kansas court was obtained by fraud and was null and void; that F. M. Tull was not a resident of Kansas at the time the suit was instituted; that the defendant Lucy A. Tull had not been served with process in the suit and had no knowl-

edge of it, and that the pretended appearance of Lucy A. Tull by attorney was unauthorized, fraudulent and void. They also claimed that the Society, by its acts theretofore, and by the proceedings had, was now estopped to deny the community character of the property.

The cause was tried by the Superior Court of Spokane County without a jury and decision rendered by the court in favor of the Society. The plaintiffs and minor defendant appealed to the Supreme Court of the State of Washington, in which court the cause was submitted on briefs and without oral argument. Thereafter on November 7, 1900, the Supreme Court rendered its decision in the cause, reversing the judgment of the lower court and remanding the case to that court to enter a decree in accordance with the decision. As is the practice in this State, the Supreme Court did not make formal findings of fact, but did find in the opinion, which is very full, covering 89 pages of the official report (23 Wash., pp. 135 to 224; Record herein pp. 508 to 579), the following facts:

That the decree of divorce was procured by fraud; that F. M. Tull was not a resident of the State of Kansas at the time he filed his suit for divorce against Lucy A. Tull, as is required by the laws of Kansas; that no service, either actual or constructive, in accordance with the laws of the State of Kansas, was had on the defendant Lucy A. Tull in that divorce suit; that the pretended appearance of an attorney for Lucy A. Tull in that divorce suit, and the pretended answer filed by him were unauthorized, without her knowledge and fraudu-

lently procured by the plaintiff, F. M. Tull (Record, pp. 554 to 562). And that the Society was estopped from disputing the title of the children. (Record, pp. 578-579.)

Thereafter the Society filed its petition for rehearing, which is not in the record, but which was denied by the Supreme Court (Record, p. 580), and the cause remanded to the lower court.

The Society having sued out a writ of error to the Supreme Court of the State of Washington, makes eleven assignments of error. (Record, pp. 587-589.)

Assignment 10 is based upon nothing whatever that can be found in the record, and it will not be pretended by plaintiff in error that the claims in specifications 10 and 11 were ever set up or claimed before they were stated in these assignments of error. But, as we will show later, this is not sufficient to give this court jurisdiction, and these assignments will not be considered by this court.

Assignment 6 does not pretend to be based on any Federal question, nor do assignments 2, 3, 4, 5, 7, 8 and 9, which merely allege error in the findings of fact of the state Supreme Court. But this court will not consider on writ of error any but Federal questions, and the findings of fact of the court below are conclusive on this court. We present in the argument below, authorities for both of these statements.

Assignment 1 is the only one which has any pretense of a Federal question, and we believe this does not stand on examination.

Argument.

MOTION TO DISMISS.

1. NO FEDERAL QUESTION WAS SET UP OR CLAIMED IN THE COURT BELOW.

The first ground on which is based our motion to dismiss the writ of error for lack of jurisdiction is that no Federal question was specially set up or claimed in the court below. The pleadings set out in the transcript of the record, which has been printed, fail to show any reference to the Constitution of the United States, either directly or indirectly, and the entire record of the trial proceedings also fails to show any such claim at any time or in any place.

There are certain Federal questions which need not be raised in the lower court, but this is not one of them. This question is one of the third class enumerated in Section 709 Revised Statutes, as was pointed out in the case of *Columbia W. P. Co. v. Columbia E. S. R. L. & P. Co.*, 172 U. S., 475, where the court said:

"To the argument that the Federal right was not 'spe-
"'cially set up and claimed,' in the language of Revised Stat-
"utes, Section 709, it is replied that this is not one of the cases
"in which it is necessary to do so. Under this section there are
"three classes of cases in which the final decree of a state court
"may be re-examined here:

(1) "'Where is drawn in question the validity of a
"'treaty, or statute of, or authority exercised under, the United
"'States, and the decision is against their validity;'

(2) " 'Where is drawn in question the validity of a stat-
" 'ute of, or an authority exercised under, any State on the
" 'ground of their being repugnant to the Constitution, treaties
" 'or laws of the United States, and the decision is in favor
" 'of their validity;'

(3) " 'Or where any title, right, privilege or immunity
" 'is claimed under the Constitution, or any treaty or statute
" 'of, or commission held or authority exercised under, the
" 'United States, and the decision is against the title, right,
" 'privilege or immunity specially set up and claimed by either
" 'party under such Constitution, statute, commission or au-
" 'thority.'

"There is no doubt that under the third class the Federal "right, title, privilege, or immunity must be, with possibly "some rare exceptions, specially set up or claimed, to give this "court jurisdiction. Spies v. Illinois, 123 U. S., 131, 181; "French v. Hopkins, 124 U. S., 524; Chappell v. Bradshaw, "128 U. S., 132; Baldwin v. Kansas, 129 U. S., 52; Leeper v. "Texas, 139 U. S., 462; Oxley Stave Co. v. Butler County, "166 U. S., 648."

In the case of *F. G. Oxley Stave Co. v. Butler County*, 166 U. S., 648, this court went fully into the question of the necessity for the claim to have been "specially set up and "claimed" before the lower court. It was there said:

"But can it be said that the plaintiffs *specially* set up or "claimed the protection of that amendment against the opera-

"tion of that decree by simply averring—without referring to "the Constitution, or even adopting its phraseology—that the "decree was passed against deceased persons, as well as in the "absence of necessary or indispensable parties?

"This question must receive a negative answer, if due "effect be given to the words 'specially set up or claimed' in "Section 709 of the Revised Statutes. These words were in "the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. "85), and were inserted in order that the revisory power of "this court should not extend to rights denied by the final judg- "ment of the highest court of a State, unless the party claiming "such rights plainly and distinctly indicated, before the state "court disposed of the case, that they were claimed under the "Constitution, treaties, or statutes of the United States. The "words 'specially set up or claimed' imply that if a party in- "tends to invoke for the protection of his rights the Constitu- "tion of the United States, or some treaty, statute, commission, "or authority of the United States, he must so declare; and, "unless he does so declare 'specially,' that is, unmistakably, this "court is without authority to re-examine the final judgment "of the state court. This statutory requirement is not met if "such declaration is so general in its character that the purpose "of the party to assert a Federal right is left to mere inference. "* * * Upon like grounds the jurisdiction of this court "to re-examine the final judgment of a state court cannot arise "from mere inference, but only from averments so distinct and "positive as to place it beyond question that the party bringing

"a case here from such court intended to assert a Federal "right."

And this conclusion has been repeatedly reaffirmed, and we call attention to the following cases where the rule has been laid down which is applicable to this case:

"But when the jurisdiction of this court is invoked for "the protection, against the final judgment of the highest court "of a State, of some title, right, privilege or immunity secured "by the Constitution or laws of the United States, it must ap- "pear expressly or by necessary intendment, from the record, "that such right, title, privilege or immunity was 'specially set "'up or claimed' under such Constitution or laws. Rev. St. "709. Our jurisdiction cannot arise in such case from infer- "ence, but only from averments so distinct and positive as to "place it beyond question that the party bringing the case up "intended to assert a Federal right."

Kipley v. Illinois, 170 U. S., 182.

"If a party to an action in a state court intends to invoke "for the protection of his rights the Constitution of the United "States, or some treaty, statute, commission, or authority of "the United States, he must so declare."

Chapin v. Fye, 179 U. S., 127.

In which case the party clearly raised a Federal question, but inadvertently named the Fifth and Seventh Amendments to the Constitution instead of the Fourteenth Amendment, but this was held insufficient and the writ of error was dismissed.

"The rule is firmly established, and has been frequently "reiterated, that the jurisdiction of this court to re-examine "the final judgment of a state court, under the third division "of section 709, cannot arise from mere inference, but only "from averments so distinct and positive as to place it beyond "question that the party bringing the case here from such court "intended to assert a Federal right. The statutory require- "ment is not met unless the party unmistakably declares that "he invokes, for the protection of his rights, the Constitution, "or some treaty, statute, commission or authority, of the United "States. Applying this rule to the case before us, the writ of "error cannot be maintained."

Michigan Sugar Co. v. Michigan, 185 U. S., 112.

"To give us jurisdiction under section 709 of the Revised "Statutes, because of the denial by a state court of any title, "right, privilege, or immunity claimed under the Constitution, "or any treaty or statute of the United States, it must appear "on the record that such title, right, privilege, or immunity was "'specially set up or claimed' at the proper time in the proper "way. To be reviewable here, the decision must be against the "right so *set up or claimed.*"

Jacobi v. Alabama, (decided Nov. 17, 1902), 23 Sup. Ct. Rep., 48.

In no place in the pleadings in the case in hand and in no place in the proceedings at the trial or on the appeal, is there any reference to the Constitution of the United States or any claim under it. The only color for the idea that such a claim

was made is found in the opinion of Mr. Justice White in the court below (Record, p. 562), where he says:

"But the respondent claims that, inasmuch as the record "shows the appearance of Lucy A. Tull by an attorney in the "divorce suit in Kansas, it cannot now be collaterally ques- "tioned by her heirs in this suit, or the jurisdiction of the court "disputed. This divorce record is plead and introduced in "evidence and effect is sought to be given to it here by virtue "of Section 1, Article IV, Constitution of the United States, "and the laws of Congress, to give full credit to the records "of sister states."

We thus have the unusual condition, for we have been unable to find its parallel in our reports, where the court raises and refers to a constitutional question as if it had been raised by the plaintiff in error, when in fact the plaintiff in error had not at any time raised the question or referred to it in any way. It is doubtful if it could be held to have been decided by the court adversely to the plaintiff in error, for, as was said by Mr. Justice Peckham, speaking for this court:

"A point that was never raised, cannot be said to have "been decided adversely to a party who never set it up or in "any way alluded to it."

Dewey v. Des Moines, 173 U. S., 193.

But we are not concluded by this statement of the judge who wrote the opinion. Whether the Federal claim was properly and sufficiently set up is a question for this court and any statement by the court below or by any of its members does not

bind this court. As was said in the late case of *Erie Railroad Co. v. Purdy*, 185 U. S., 148:

"We state the matter in this way because, as said in Carter "v. Texas, 177 U. S., 442, 447, 'the question whether a right "'or privilege, claimed under the Constitution or laws of the "'United States, was distinctly and sufficiently pleaded and "'brought to the notice of a state court, is itself a Federal "'question, in the decision of which this court, on writ of error, "is not concluded by the view taken by the highest court of the "'State. Neal v. Delaware, 103 U. S., 370, 396, 397; Mitchell "'v. Clark, 110 U. S., 633, 645; Boyd v. Thayer, 143 U. S., "'135, 180.'"

And it has been held that a certificate by the Chief Justice of the Supreme Court of the State is insufficient to give this court jurisdiction, but that such a certificate may be used to make certain and specific what is too general and indefinite in the record.

See *Yazoo & Miss. Railroad Co. v. Adams*, 180 U. S., 41, and cases cited.

It was held in *Zadig v. Baldwin*, 166 U. S., 485, that statements from the briefs filed in the Supreme Court of the State were not proper to show that the Federal question was raised in the lower court, and this has never been overruled. But in New *York Central Railroad Co. v. New York*, 186 U. S., 269, it was said:

"But assuming, without intimating an opinion to that "effect, that the raising of a Federal question in the brief might

"be sufficient, it is well settled in this court that it must be made "to appear that some provision of the Federal, as distinguished "from the state, Constitution was relied upon, and that such "provision must be set forth." And the court looked at the briefs to see if the Federal question was raised in them, and found it was not.

The certificate of the Chief Justice of the Supreme Court of the State of Washington with the briefs attached has been filed in this court by the clerk of that court as a supplemental transcript duly certified. That a supplemental transcript may be sent up by the clerk was held by this court in *Crandall v. Nevada,* (not in official report), Vol. 18, Law Edition U. S. Supreme Court Reports, p. 744.

That in the State of Washington, the briefs are a part of the record in the Supreme Court would seem clear from Section 6513 Ballinger's Annotated Codes and Statutes of Washington, which provides:

"Within four months after an appeal shall have been taken "by notice as provided in this title, the clerk of the superior "court shall prepare and certify and send up to the supreme "court, at the expense of the appellant (except in criminal ap- "peals prosecuted in *forma pauperis,* and in such cases at the "expense of the county), the original briefs on appeal filed and "any original bill of exceptions or statement of facts, and a "copy of so much of the record and files as the appellant shall "deem material to the review of the matters embraced within "the appeal. The papers and copies so sent up, together with

"any thereafter sent up as hereinbelow provided, shall consti-
"tute the record on the appeal."

So that there is now before this court, as is stated in the certificate of the Chief Justice, all the records and all the arguments which were before the court below, and this court can see for itself what questions were raised and how they were raised.

We have gone carefully through all the record and the briefs and have been unable to find the slightest reference to the Constitution of the United States or any claim thereunder, and nothing whatever to indicate that "the party bringing a "case here from such court intended to assert a Federal right." Indeed an examination of the brief filed by the Society in that court shows that there was not only no Federal right asserted but no thought of a Federal question of any kind in connection with the case.

It is very evident that no Federal question at all was set up or claimed in the court below, and that the statement by the Judge in the opinion is a mistake. He saw that such a Federal question could have been raised, and when he wrote the opinion forgot that it was not raised by any of the parties.

It will not be necessary for this court to go all through the lengthy record and briefs to decide if or where a Federal question was raised, for if a Federal question was raised, the plaintiff in error in his brief on this motion will point out to the court the specific pages in the record where this was done,

and failing to do this, must concede the correctness of our statement.

But if the record does not show that the Federal question was raised, but the record shows that the Federal question was not raised, we submit that under *Erie Railroad Co. v. Purdy*, supra, this court will say that the Federal question was not set up or claimed before the court below and therefore that the writ of error must be dismissed.

2. THE COURT BELOW DECIDED THE CASE UPON AN INDEPENDENT NON-FEDERAL GROUND, BROAD ENOUGH TO SUPPORT THE JUDGMENT.

In the pleadings in this cause, the Society set up the decree of divorce rendered by the Kansas court, claiming thereby that the property in question was the separate property of F. M. Tull and not the community property of himself and wife. The children claimed, however, not only that the judgment was void, but also, that the Society by its acts was estopped to set up the claim that the property was not community property. And this claim was sustained by the Supreme Court of the State. The opinion says:

"We have already decided that the property in controversy "is presumed to have been the community property of F. M. "Tull and wife at the time of her death. If this presumption "did not control, we think that the respondent is estopped from "disputing the title of these children. When Lucy A. Tull died

"respondent refused to go on with the loan until the interest "of the children was transferred to the father. F. M. Tull and "the respondent dealt with this property as a whole on the basis "that the children had one-half interest therein. F. M. Tull "and Lucy A. Tull had agreed as to the status of the property "before her death, and this status was recognized by the re- "spondent; but the presumption that it was community prop- "erty not having been overthrown, it is not necessary to further "comment on the effect and character of this estoppel." (Record, pp. 578-579.)

This court has stated the principle that even if the state court has decided against the plaintiff in error on a Federal question, this court will not look into the Federal question, if the state court has decided against the plaintiff in error on an independent ground sufficient to support the judgment, not involving a Federal question. The principle is clearly stated in *Bacon v. Texas*, 163 U. S., 207, as follows:

"But where there are two grounds for the judgment of the "state court, one only of which involves a Federal question, and "the other is broad enough to maintain the judgment sought "to be reviewed, it is now settled that this court will not look "into the Federal question, inasmuch as there is another ground "upon which the judgment can rest, and it will dismiss the writ "for that reason. Eustis v. Bolles, 150 U. S., 361. In the "course of the opinion in that case, which was delivered by "Mr. Justice Shiras, the case of Beaupre v. Noyes, 138 U. S.

"397, 401, is cited, and the opinion of the latter case contains "the following statement: 'Whether the state court so in- " 'terpreted the territorial statute as to deny such writ to plain- " 'tiffs in error, we need not inquire, for it proceeds in part " 'upon another and distinct ground, not involving a Federal " 'question, and sufficient in itself to maintain the judgment, " 'without reference to that question.' The opinion after stat- "ing what that ground was, thus continues: 'That view does " 'not involve a Federal question. Whether sound or not, we " 'do not inquire. It is broad enough in itself to support the " 'final judgment, without reference to the Federal question.'

'In Rutland Railroad v. Central Vermont Railroad, 159 "U. S., 630, it is stated, 'that where a state court. in rendering " 'judgment, decides a Federal question, and also decides " 'against the plaintiff in error upon an independent ground, " 'not involving a Federal question, and broad enough to sup- " 'port the judgment, this court will dismiss the writ of error " 'without considering the Federal question.' To same effect "are Gillis v. Stinchfield, 159 U. S., 658, 660; and Seneca "Nation of Indians v. Christy, 162 U. S., 283."

And in later cases this principle has been reaffirmed and restated as the following quotations will show:

"The Supreme Court, it is true, passed on other grounds, "passed on the one which it is claimed involved a Federal ques- "tion, and decided it adversely to plaintiff. But the rule in "such cases has been repeatedly declared by this court. It is

"not necessary to review the decisions. That has been done by "Mr. Justice Shiras in Eustis v. Bolles, 150 U. S., 361. It is "sufficient to announce the rule pronounced in that case:

" 'It is settled law that, to give this court jurisdiction of " 'a writ of error to a state court, it must appear affirmatively, " 'not only that a Federal question was presented for decision " 'by the state court, but that its decision was necessary to " 'the determination of the cause, and that it was actually de- " 'cided adversely to the party claiming a right under the Fed- " 'eral laws or Constitution, or that the judgment as rendered " 'could not have been given without deciding it. Murdock v. " 'Memphis, 20 Wall, 590; Cook County v. Calumet & Chi- " 'cago Canal Co., 138 U. S., 635.

" 'It is likewise settled law that where the record discloses " 'that if a question has been raised and decided adversely to a " 'party claiming the benefit of a provision of the Constitution " 'or laws of the United States, another question, not Federal, " 'has been also raised and decided against such party, and the " 'decision of the latter question is sufficient, notwithstanding " 'the Federal question, to sustain the judgment, this court " 'will not review the judgment.' See also Wade v. Lawder, "165 U. S. 624."

Harrison v. Morton, 171 U. S., 38.

"We have repeatedly held that even the decision by the "state court of a Federal question will not sustain the juris-

"diction of this court, if another question, not Federal, were "also raised and decided against the plaintiff in error, and the "decision thereof be sufficient, notwithstanding the Federal "question, to sustain the judgment."

McQuade v. Trenton, 172 U. S., 636.

"It has been frequently held that the contention, even if "formally made, that the plaintiffs in error were seeking to "avail themselves of some right or immunity under the Consti- "tution or laws of the United States does not give us jurisdic- "tion to review the judgment of the Supreme Court of a State "where that judgment was based upon a doctrine of general "law sufficient of itself to determine the case. Beaupre v. "Noyes, 138 U. S., 397; Eustis v. Bolles, 150 U. S., 361; "Pierce v. Somerset Railway, 171 U. S., 641; Remington Pa- "per Co. v. Watson, 173 U. S., 443."

Seeberger v. McCormick, 175 U. S., 274.

The estoppel was a sufficient ground on which to base the judgment and was entirely non-Federal in its character. If the Society was estopped to deny the community character of the property then the Kansas decree of divorce was not material to the case.

It has been decided in many cases in this court that estoppel is a good and sufficient ground in such cases on which to support a judgment.

In *Moran v. Horsky*, 178 U. S., 205, it was held that

the defense of laches was an independent non-Federal question, broad enough to sustain the judgment of the state court and the writ of error was dismissed.

In *Speed v. McCarthy*, 181 U. S., 269, it was held that when the state court decided that defendants were estopped to set up a certain claim, then a Federal question could not be raised in this court on that claim.

In *Adams County v. Burlington & Missouri Railroad Co.*, 112 U. S., 123, the state court did not discuss the Federal question, but only the question of estoppel and this court said:

"Then, as to the cross bill, it finds the legal title to be in "the company, and that the county is estopped from claiming "the lands, or denying the company's title thereto. This of "itself implies that there was in fact no decision against any "right, title, privilege, or immunity claimed under the Consti- "tution or laws of the United States, and that the decree rested "alone on the defense of estoppel, which was broad enough to "control the rights of the parties without disposing of the "federal question which it was attempted to raise. In other "words, it was adjudged by the State court that the title of "the company must prevail in this suit because the county was "precluded by its conduct from insisting to the contrary."

In *Pierce v. Somerset Railway*, 171 U. S., 641, the writ of error was dismissed on this ground, the court saying:

"It is thus seen that there were two questions determined

"by the state court: One related to the validity of the statutes "passed subsequently to the execution of the mortgage, the "court holding them valid, and that they did not impair the "obligation of the contract contained in the mortgage. That "is a Federal question. The other related to the defense of "estoppel on account of laches and acquiescence, which is not "a Federal question. Either is sufficient upon which to base "and sustain the judgment of the state court. In such case a "writ of error to the state court cannot be sustained. Eustis "v. Bolles, 150 U. S., 361; Rutland Railroad v. Central Ver- "mont Railroad, 159 U. S., 630; Seneca Nation v. Christy, 162 "U. S., 283."

And also in *Hale v. Lewis*, 181 U. S., 473:

"It is clear that the Supreme Court disposed of the case "upon non-Federal ground broad enough to support the judg- "ment. It held, in substance, that, conceding the law to be "unconstitutional, the corporation is estopped to set up its "invalidity, by the action of the board of directors in deposit- "ing securities with the state treasurer under the Wisconsin "statute."

And we ask especial attention to the case of *Lowry v. Silver City Gold and Silver Mining Co.*, 179 U. S., 196. In that case the state court took up and discussed for several pages the Federal question, and decided it against the plaintiff in error, and then at the close of the opinion, in four or five lines it held the plaintiff was also estopped. (19 *Utah*, 334.) Just as in our case, where the court below discussed what might have been a Federal question, and after deciding that question

against plaintiff in error, held that plaintiff in error was, in any case, estopped to claim that the children had no title in the property. This court said:

"The Supreme Court of the State placed its decisions upon "two grounds: First, that although the Evening Star claim "included the original discovery shaft of the Wheeler claim, it "did not thereby destroy that claim in view of the fact that long "prior to the location of the Evening Star the owners of the "Wheeler had located a new shaft and developed the mine in "that shaft. Gwillim v. Donnellan, 115 U. S., 45, was held "not applicable. The other ground was estoppel by virtue "of the lease under which two of the plaintiffs in error acquired "possession. While the former ground is the one principally "discussed in the opinion, the latter was adverted to in a few "words at its close. The latter is sufficient to dispose of the "case in this court. Eustis v. Bolles, 150 U. S., 361. See also "DeLamar's Nevada Gold Mining Company v. Nesbitt, 177 "U. S., 523, and cases cited in the opinion. The writ of error "is dismissed."

Lowry v. Silver City Gold and Silver Mining Co., 179 U. S. 196.

We respectfully submit that the facts of this case bring it within the principles above set forth and that the writ of error should be dismissed.

If this court should decide that there is sufficient color of a Federal question to sustain its jurisdiction, we have added a motion to affirm on the grounds that the question on which

the jurisdiction depends is so frivolous as not to need further argument and that it is manifest the writ was taken for delay only.

MOTION TO AFFIRM.

I. THE QUESTION IS SO FRIVOLOUS THAT IT NEEDS NO FURTHER ARGUMENT.

It is claimed that the Supreme Court of the State of Washington did not give full faith and credit to the decree of divorce rendered by the Kansas Court.

This decree was entitled to the same effect in Washington that it would have had in Kansas and no more.

As was said in *Hancock National Bank v. Farnum*, 176 U. S., 640, in which case a Kansas judgment had been denied validity in the suit in Rhode Island:

"The Constitution declares that full faith and credit shall "be given in each State to the public acts, records, and judicial "proceedings of every other State, and that Congress may not "only prescribe the mode of authentication, but also the effect "thereof. Section 905 prescribes such mode, and adds that the " 'records and judicial proceedings, so authenticated, shall have " 'such faith and credit given to them in every court within the " 'United States as they have by law or usage in the courts of " 'the State from which they are taken.' Such is the Con- "gressional declaration of the effect to be given to the records "and judicial proceedings of one State in the courts of every

"other State. In other words, the local effect must be recog-
"nized everywhere through the United States.

"What, then, is the faith and credit given by law or usage
"in the courts of Kansas to a judgment against a corporation?
"What is the effect of such a judgment as there established?
"This is a question not answered by referring to general prin-
"ciples of law, by determining what at common law was the
"significance and effect of a judgment, but can be answered
"only by an examination of the decisions of the courts of
"Kansas."

And the rule that a judgment is entitled to only the same faith and credit that it would have in its own state has been the law at least since Congress in 1789 so declared. There has never been any doubt on that question.

How far then was this divorce decree rendered by the Kansas court in Tull v. Tull conclusive, and for what matters could it be collaterally assailed? We find our answer in the Kansas decisions which have been uniform on this question from the beginning.

In *Litowich v. Litowich*, 19 Kan., 455, (Jan. 1878), it was held that a Utah decree of divorce was void for lack of jurisdiction; that it could be collaterally attacked and shown to be void by evidence *dehors* the record, the court saying:

"And indeed, any judgment from a sister State, void for
"want of jurisdiction, may be shown to be void in any pro-
"ceeding, direct or collateral, and by evidence *dehors* the record,
"provided that the record itself does not show the invalidity

"of the judgment upon its face. Thompson v. Whitman, 18 "Wall., 457; Knowles v. Gaslight Co., 19 Wall., 58; Rape v. "Heaton, 9 Wis., 328, 332; Price v. Ward, 25 N. J. L. (1 "Dutch), 225; Aldrich v. Kinney, 4 Conn., 380; Starbuck v. "Murray, 5 Wend., 148, 153; Shumway v. Stillman, 6 Wend., "447, 452; Hall v. Williams, 6 Pick., 232, 237; Carleton v. "Bickford, 13 Gray, 591; Pollard v. Baldwin, 22 Iowa, 328; "Norwood v. Cobb, 15 Texas, 500; same case, 24 Texas, 551."

And again, in *Thorn v. Salmonson*, 37 Kan., 441, the court said:

"A foreign judgment rendered without jurisdiction may "be assailed in either a direct or collateral proceeding. Al- "though the recitals contained in the judgment that service "was made, raise a strong presumption in favor of the jurisdic- "tion and of the truth of the recitals, yet the plaintiff may show "by extrinsic evidence, if she can, that no service was actually "made. Strong proof will be required to overthrow the pre- "sumption of jurisdiction raised by the recitals; but if it is "clearly shown that the plaintiff was not served with process, "and did not voluntarily appear or submit to the jurisdiction "of the court, the recitals are of no value. Litowich v. Lito- "wich, 19 Kan., 451, and cases cited; Mastin v. Gray, Id., 458; "Pollard v. Baldwin, 22 Iowa, 328; Lazier v. Westcott, 26 "N. Y., 26 N. Y., 146; Freem. Judgm., 588 *et seq.*"

And in *Larimer v. Knoyle*, 43 Kan., 338:

"It is well settled in this State that a judgment rendered "without jurisdiction is void, absolutely and entirely, and may

"be shown to be void in a collateral as well as in a direct pro-"ceeding, and by extrinsic evidence as well as by the record "itself, and a judgment rendered against a party who has not "been served in any manner with summons or notice, and who "has not made any appearance in the case, is a judgment ren-"dered without jurisdiction. Mastin v. Gray, 19 Kan., 458; "Litowich v. Litowich, Id., 451; Amsbaugh v. Bank, 33 Kan., "100, 5 Pac. Rep., 384; Thorn v. Salmonson, 37 Kan., 441, "15 Pac. Rep., 588."

And in *Chicago R. I. & Pac. R. R. Co. v. Campbell,* 58 Kan., 818, 51 Pac. Rep., 1100, in which a judgment of Iowa was under consideration:

"The contention is that the court below did not give that "faith and credit to the proceedings of the courts of Iowa which "is guaranteed to the plaintiff by the provisions of the Consti-"tution of the United States and the Acts of Congress in pursu-"ance thereof. Where a party relies upon the proceedings or "judgment of the courts of one State as a cause of action or "ground or defense, the question of jurisdiction is always open. "The Supreme Court of the United States has so decided in "Pennoyer v. Neff, 95 U. S., 714; St. Clair v. Cox, 106 U. S., "350, 1 Sup. Ct., 354; Thompson v. Whitman, 18 Wall., 457; "Board of Public Works v. Columbia College, 17 Wall., 521."

And the last decision by that court on that subject that we have found is *Abercrombie v. Abercrombie* (Jan., 1902), 67 Pacific Reporter, 539, where the judgment of a sister State was under consideration, and it was said:

"The fact that the judgment sued on in this case is the "judgment of a sister State can make no difference. It is only "when jurisdiction is admitted that full faith and credit should "be given to the judgments of a sister State. That the judg- "ment of a sister State may be attacked collaterally on the "ground that jurisdiction was obtained fraudulently is sup- "ported by many authorities. * * * It is now perfectly "well settled that the judgment of a court without jurisdic- "tion of both the subject matter and of the person is absolutely "void. It is, in legal effect, no judgment. No rights can be "acquired under it, and no rights divested by it. Whenever "such a judgment is relied upon for any purpose or in any way, "the fact of the existence of jurisdiction may be inquired into. "The only serious question that has arisen of late years upon "this matter is as to whether the judgment could be collaterally "inquired into, as to the jurisdiction of the person, when it "recites on its fact that there was service of process or per- "sonal appearance. But now even that question is practically "at rest."

There has never been any doubt as to what the law was in Kansas on that question.

The State court of Washington considered the evidence offered with regard to the Kansas decree of divorce and found that decree to be void, for the following reasons: That the decree was obtained by fraud; that the plaintiff was not a resident of Kansas, as required by the laws of Kansas, at the time he filed the suit or thereafter; that no service, according to the laws of Kansas, was had on the defendant; and that the

pretended appearance by attorney for her was unauthorized, fraudulent and void.

And that these are the findings of the State Supreme Court is stated by plaintiff in error in its assignments of error. (Record, p. 587-589.)

All these defenses to the decree could have been raised in any court in Kansas. So that the same faith and credit was given the Kansas decree as would have been given it in the Kansas courts and the constitutional mandate has been complied with.

It is true that the plaintiff in error contends, and it is really its only contention, that the State court erred in its findings of fact. But those findings are conclusive on this court and cannot be re-examined for any purpose.

As was said by this court in *Egan v. Hart*, 165 U. S. 188:

"On error, however, to a State court, this court cannot "re-examine the evidence, and, when the facts are found below, "is concluded by such finding. Dower v. Richards, 151 U. S., "658; Bartlett v. Lockwood, 160 U. S., 357; Stanley v. "Schwalby, 162 U. S., 255, 278. True, it is that in Dower "v. Richards the court (referring to the dictum in Republican "River Bridge Co. v. Kansas Pacific Railway, 92 U. S., 315, "317), treated as open for further consideration the question "whether, in chancery cases, the power existed in this court to "review the decision of state courts on both the law and the "fact. We, however, conclude that not only the very nature

"of a writ of error, but also the rulings of this court from the "beginning, make it clear that on error to a State court in a "chancery case, as in a case at law, when the facts are found "by the court below, this court is concluded by such findings. "The adjudications are collected very fully in Dower v. Rich- "ards and in the subsequent cases above referred to."

And this has been repeatedly reaffirmed; see

Hedrick v. A. T. & S. F. Ry. Co., 167 U. S., 673.
Atchison T. & S. F. Ry. Co. v. Matthews, 174 U. S., 96.
Whitney v. United States, 181 U. S., 104.
Eastern B. & L. Assn. v. Ebaugh, 185 U. S., 114.
Jenkins v. Neff, 185 U. S., 230.
Bement v. National Harrow Co., 185 U. S., 70.

It would seem that there could be no room for argument on any of these questions. The findings of the state court are conclusive that the Kansas court did not have jurisdiction to render the decree of divorce. The Kansas courts have always held that this could be shown against a decree of a Kansas or other court. And this court has always held that a judgment was not entitled to greater faith and credit away from home than it would receive at home.

This would certainly seem to be one of those cases where as is said in *Equitable Life Assurance Society v. Brown*, 23 Sup. Ct. Rep. 123: "It is evident on the face of the record "that the question on the merits is not open to possible conten- "tion becaue it has previously been so specifically and adversely "ruled on by this court as to absolutely foreclose further con- "tention on the subject."

The 10th assignment of error is not based on anything that appears in the record, so cannot be considered.

The question raised by the 11th assignment of error that the decree was too broad for the pleadings, was discussed by counsel in their briefs and by the state court (Record pp. 551-553) and decided against plaintiff in error. This is not a Federal question and hence will not be considered by this court.

The rule in such cases was clearly stated by Mr. Chief Justice Waite in *McLaughlin v. Fowler*, 154 U. S., 663.

"We can only look beyond the Federal question when that "has been decided erroneously, and then only to see whether "there are any other matters or issues adjudged by the state "court sufficiently broad to maintain the judgment, nothwith-"standing the error in the decision of the Federal question. "Murdock v. City of Memphis, 20 Wall., 590."

And it is too well settled to need citation of authorities that a person is not deprived of his property without due process of law, when he has had his day in court on the question involved, when, as in this case, the question of what decree could be given under the pleadings was discussed by counsel, and discussed at length by the court when it decided the case and the question against plaintiff in error.

The other eight assignments of error are against the findings by the state court, and as we have seen above, those findings cannot be re-examined by this court.

There is no real Federal question in any of those assign-

ments, but it is such a case as this court has held should be affirmed without further delay or argument. In *Wilson v. North Carolina*, 169 U. S., 586, it is said:

"Upon the case made by the plaintiff in error, the Federal "question which he attempts to raise is so unfounded in sub- "stance that we are justified in saying that it does not really "exist; that there is no fair color for claiming that his rights "under the Federal Constitution have been violated, either by "depriving him of his property without due process of law or "by denying him the equal protection of the laws.

"In Hamblin v. Western Land Company, 147 U. S., 531, "it was stated that 'a real, and not a fictitious, Federal question " 'is essential to the jurisdiction of this court over the judg- " 'ments of state courts. Millingar v. Hartupee, 6 Wall., 258; " 'New Orleans v. New Orleans Water Works Co., 142 U. S., " '79, 87. In the latter case it was said that 'the bare averment " 'of a Federal question is not in all cases sufficient. It must " 'not be wholly without foundation. There must be at least " 'color of ground for such averment, otherwise a Federal ques- " 'tion might be set up in almost any case, and the jurisdiction " 'of this court invoked simply for the purpose of delay.' "

The Federal question relied on is devoid of any substantial foundation or merit, just as in *New Orleans Water Works Co. v. Louisiana*, 185 U. S., 336, where it was said:

"It has long been the holding of this court that in order to "warrant the exercise of jurisdiction over the judgments of "state courts there must be something more than a mere claim

"that a Federal question exists. There must, in addition to the "simple setting up of the claim, be some color therefor, or, in "other words, the claim must be of such a character that its "mere mention does not show it destitute of merit; there must "be some fair ground for asserting its existence, and, in the "absence thereof, a writ of error will be dismissed, although the "claim of a Federal question was plainly set up. Thus, in Mil- "lingar v. Hartupee, 6 Wall., 258, the Chief Justice (at page "261), said: 'Something more than a bare assertion of such "'an authority seems essential to the jurisdiction of this court. "'The authority intended by the act is one having a real exist- "'ence, derived from competent governmental power.' This "case arose under the 25th section upon the assertion that the "validity of an authority exercised under the United States "was drawn in question, and the decision was against its "validity. It was held not sufficient to make the claim, but "there must be some color of foundation for its assertion."

And the question of the necessity of a substantial claim was fully reviewed by this court in the late case of *Equitable Life Assurance Society v. Brown* (Dec., 1902), 23 Sup. Ct. Rep., 123:

"From the analysis just made, it results that although a "Federal question was raised below in a formal manner, that "question, when examined with reference to the averments of "fact upon which it was made to depend, is one which has been "so explicitly decided by this court as to foreclose further argu- "ment on the subject, and hence to cause the Federal question "relied upon to be devoid of any substantial foundation or

"merit. This being so, the case, is brought directly within the "rule announced in New Orleans Water Works Co. v. Louisi- "ana, 185 U. S., 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep., "691, and authorities there cited. It is likewise also apparent "from the analysis previously made that even if the formal "raising of a Federal question was alone considered on the "motion to dismiss, and therefore the unsubstantial nature of "the Federal question for the purposes of the motion to dismiss "were to be put out of view, the judgment below would have "to be affirmed. This follows, since it is plain that as the sub- "stantiality of the claim of Federal right is the matter upon "which the merits depend, and that claim being without any "substantial foundation, the motion to affirm would have to "be granted under the rule announced in Chanute v. Trader, "132 U. S., 210, 33 L. ed. 345, 10 Sup. Ct. Rep., 67; Richard- "son v. Louisville & N. R. Co., 169 U. S,, 128, 42 L. ed. 687, "18 Sup. Ct. Rep., 268, and Blythe v. Hinckley, 180 U. S., 338, "45 L. ed. 561, 21 Sup. Ct. Rep., 390."

We believe that an examination of the record in this cause shows that the plaintiff in error is not concerned so much about any possible Federal question, but about the findings of the court below on the facts; that the alleged Federal question is raised not for any intrinsic value it may possess, but in order to provide a peg on which may be hung the objections to the findings of fact made by that court. A reading of the errors assigned for this writ shows, we believe, the truth of this statement. It has seemed to us, with regard to this phase of the question, that the remarks of Mr. Justice Brewer in the late

case of *Beals v. Cone et al.* (decided January 26, 1903, not yet reported), are particularly apposite to the case in hand:

"Indeed, while this case has evidently been hotly contested, "yet the matters which were subjects of controversy and de- "termination were questions of fact concerning the time, extent "and effect of the alleged discoveries of mineral, and "also alleged wrongs in respect to the jury. To "those matters, and those alone, was the attention of "the parties and the courts directed. Counsel for "plaintiff in error has filed an elaborate brief of 249 printed "pages, which is able and exhaustive, both on questions of min- "ing law and the conduct of the trial. One cannot, however, "fail to be impressed, after a perusal thereof, with the fact of "a failure to recognize that there is no general right to a writ "of error from this court to the courts of a state; that there is "but a special right, a right to bring such cases, and such cases "only, as disclose a Federal question distinctly ruled adversely "to the plaintiff in error. We fail to see that any title, right, "privilege or immunity of a Federal nature was specially set "up and claimed. Very likely the construction and the effect of "Federal statutes were, in a general way discussed and consid- "ered, but nowhere do we find that special setting up or claim- "ing of a Federal right which justifies us in taking jurisdiction. "As we have stated, the validity of no Federal statute was de- "nied in the State courts. Neither did the plaintiff in error, "prior to the judgment of affirmance in the Supreme Court, "challenge the validity of any State statute on the ground of

"its repugnance to paramount Federal law. The writ of error "is dismissed."

2. That the writ is frivolous and was taken only for delay, and that the judgment should be affirmed with damages.

What was said by this court in *Blythe v. Hinckley*, 180 U. S., 333, seems very pertinent to our case:

"But the motion to affirm should be granted because the "assignments of error are frivolous and we are convinced the "writ was taken only for delay. This is the ground for the "decisions in Chanute City v. Trader, 132 U. S., 210, 214, and "Richardson v. Louisville & Nashville Railroad Co., 169 U. S., "128, 132. * * * The claim which the plaintiff in error "founds upon the section of the Federal Constitution is too "plainly without foundation to require further argument. The "right of the defendant in error to this property has been in "litigation for more than fifteen years, and many years after "courts of competent jurisdiction have decided all the questions "in her favor, and we think this writ of error, judging by the "character of the question sought to be raised under it has been "taken for delay only. The judgment must be affirmed."

Let us look a moment at the facts in this case. The property was taken from the children in 1887, and this suit to recover that property was begun by them six years ago, when two of them were of age. After a full trial in the lower court, an appeal was taken to the Supreme Court of the State of Washington, where all points were considered and the full relief asked for granted to the children. Thereafter a petition

for rehearing was filed by the Society and denied. In all the pleadings and all the proceedings in the lower court and in the Supreme Court, no hint or suggestion had been made that a Federal right was claimed or a Federal question raised. The plaintiff in error waited nineteen months after the decision by the Supreme Court, and then sought a writ of error from this court, giving eleven assignments of error. One of these is based on facts, no word of which is in the record. Eight are simply attacks on the findings by the Supreme Court, and the remaining two are, we believe, without the support of any decision which has ever been rendered by this court.

We believe this is just such a case as this court had in mind when it said in *Whitney v. Cook*, 99 U. S., 607:

"Our experience teaches that the only way to discourage "frivolous appeals and writs of error is by the use of our power "to award damages, and we think this a proper case in which "to say that hereafter more attention will be given to that sub- "ject, and the rule enforced both according to its letter and "spirit. Parties should not be subjected to the delay of pro- "ceedings for review in this court without reasonable cause, "and our power to make compensation to some extent for the "loss occasioned by an unwarranted delay ought not to be over- "looked.

And on the authority and precedents of

Kilbourne v. State Sav. Inst., 22 How. 503.

Hennessy v. Sheldon, 12 Wall., 440.

West Wisconsin R. Co., v. Foley, 94 U. S., 100.

Nelson v. Flint, 166 U. S., 276.

we respectfully ask that damages be granted to defendants in error for the injury caused by this frivolous writ.

Respectfully submitted,

WILLIAM M. MURRAY,

Guardian *ad litem* of Ernest B. Tull, a minor,

in propria persona.

FREDERICK W. DEWART,

Of Counsel.